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OPINION NUMBER 2003-1

DATE: April 8, 2003

SUBJECT: George I. Loveland, Senior Deputy City Manager

REQUESTED BY: City Attorney

PREPARED BY: Prevailing Wage Specification in the City of San Diego's Public Works
Municipal Affair Contracts

QUESTIONS PRESENTED

1. Whether the City of San Diego [City] may include a prevailing wage specification in its public works municipal affair contracts?
2. Whether the City may fund its public works municipal affair projects in part with state or federal funds when the use of those funds will require the payment of prevailing wage?

SHORT ANSWERS

1. Yes. The City may include a prevailing wage specification in its public works municipal affair contracts if it is determined on a project-by-project basis that the specification is consistent with the San Diego Charter [Charter]. A prevailing wage specification should not be included, however, unless the City Council rescinds Resolution No. R-251555.
2. Yes. The City may use federal or state funds that require the payment of prevailing wage on the City's public works municipal affair projects if the funds are necessary to construct the project. If, however, the funds are not necessary to construct the project, the City

may use those funds only if on a project-by-project basis it is determined that including a prevailing wage specification is consistent with the Charter.

BACKGROUND

The history of the payment of prevailing wage on the City's public works projects dates back as early as 1931. At that time, San Diego Charter section 193 required that prevailing wage be paid on the City's public work projects [See Attachment 1]. Section 193, however, as well as other related Charter sections, were repealed by the voters in 1963 [See Attachment 2].

In 1977, the City Council adopted Resolution No. 218685, which required certain prevailing wage rates to be paid on all City contracts [See Attachment 3]. In 1980, that Resolution was rescinded by Resolution No. R-251555, wherein the City Council expressed its desire to include a prevailing wage specification in City contracts only when required by federal or state grants, and on jobs of state concern [See Attachment 4]. In 1990, this Office opined that the Charter precluded the City from requiring the payment of prevailing wage on the City's public works municipal affair projects [See Attachment 5].

Recently, the issue of whether the City may require the payment of prevailing wage on its public works municipal affair projects arose again. Specifically, in light of this Office's longstanding opinion, we questioned whether the use of a minimal amount of Community Development Block Grant [CDBG] funds on a public works project that was otherwise purely a municipal affair was an inadvertent circumvention of the Charter.¹ In order to fully analyze the issue, it became necessary to revisit our prior opinion on the prevailing wage issue. As will be explained below, we conclude that the Charter does not necessarily prohibit the payment of prevailing wage on the City's public works municipal affair projects.

ANALYSIS

I. A Prevailing Wage Specification May be Included in a Public Works Municipal Affair Contract if it is Determined on a Project-by-Project Basis that the Specification is Consistent with the Charter, but a Prevailing Wage Specification Should not be Included Unless the City Council Rescinds Resolution No. R-251555.

The Charter requires that certain public works municipal affair contracts be competitively bid and awarded to the lowest responsible and reliable bidder. It must be determined on a project-

¹ The use of CDBG funds on a City project subjects the project to federal prevailing wage requirements. *See* 42 U.S.C. § 5310.

by-project basis whether the inclusion of a prevailing wage specification is consistent with the Charter's requirements. Even if a prevailing wage specification is determined to be consistent with the Charter, it should not be included unless Resolution No. R-251555 is rescinded.

A. A Prevailing Wage Specification Could be Consistent with the Charter.

1. The State's Prevailing Wage Laws Do Not Apply to the City's Public Works Municipal Affair Projects.

The City of San Diego is a chartered city. *Mira Development Corp. v. City of San Diego*, 205 Cal. App. 3d 1201, 1214 (1988). A city's charter represents the supreme law of the city, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994). Further, under the California Constitution, a chartered city enjoys autonomy over its "municipal affairs." Cal. Const. art. XI, § 5. Consequently, a chartered city's enactments that deal with purely municipal affairs are valid even if they conflict with general state law. *Vial v. City of San Diego*, 122 Cal. App. 3d 346, 348 (1981).

There is no exact definition of the term "municipal affairs." *Bishop v. City of San Jose*, 1 Cal. 3d 56, 62 (1969). The ultimate decision as to what is a municipal affair is one which rests with the courts. *Smith v. City of Riverside*, 34 Cal. App. 3d 529, 537 n. 5 (1973). The courts have articulated three factors to weigh in determining whether a project is a municipal affair: 1) the extent of non-municipal control over the project; 2) the source and control of the funds used for the project; and 3) the nature, purpose, and geographic scope of the project. *See Southern California Roads Co. v. McGuire*, 2 Cal. 2d 115, 123 (1934). The Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern. *Bishop v. City of San Jose*, 1 Cal. 3d at 63.²

State law requires that prevailing wage be paid on certain public works projects. Cal. Lab. Code § 1771. The courts have held that the state's prevailing wage law is a general law and does not apply to the public works municipal affair projects of a chartered city. *Vial v. City of San Diego*, 122 Cal. App. 3d at 348. As such, the City is not required to include a contract specification for the payment of prevailing wage in its public works municipal affair projects. The *Vial* court, however, did not conclude that the City's charter prohibits the City from requiring the payment of prevailing wage. *See id.* at 347-348.

2. The Charter does not Explicitly Authorize or Forbid the City from Including a Prevailing Wage Specification.

² Examples of municipal affairs include the construction of city water and sewer facilities and the expenditure of city funds on a city public works project. *See Domar Electric*, 9 Cal. 4th at 170-71; *Smith v. City of Riverside*, 34 Cal. App. 3d at 534-35.

Charter provisions are construed in favor of the exercise of the power over municipal affairs and against the existence of any limitation or restriction thereon which is not expressly stated in the charter. *Domar Electric*, 9 Cal. 4th at 171. Restrictions on a charter city's power may not be implied. *Id.* A charter city may not, however, act in conflict with its charter. *Id.* Any act that violates or does not comply with the charter is void. *Id.* Thus, it must be determined whether the act of requiring prevailing wage on the City's public works municipal affair projects would conflict with the Charter.

The rules of statutory construction apply to city charters. *Oneto v. City of Fresno*, 136 Cal. App. 3d 460, 465 (1982). The interpretation of a statute is a question of law. *See Yamaha Corp. Of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 7 (1998). The primary task in interpreting a statute is to determine the lawmakers' intent. *Delaney v. Superior Court*, 50 Cal. 3d 785, 798 (1990). In the case of a provision adopted by the voters, their intent governs. *Id.*

To determine the lawmakers' intent, a court will turn first to the words themselves. *Delaney*, 50 Cal. 3d at 798. Words should be given the meaning they bear in ordinary use, as reflected in a dictionary. *See id.* "If the language is clear and unambiguous, there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)." *Id.* (quoting *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (1988)). Where the words of the charter are clear, they may not be added to or altered to accomplish a purpose that does not appear on the face of the charter or from its legislative history. *Domar Electric*, 9 Cal. 4th at 171. If an ambiguity exists, a court will look to the ballot arguments, the only available "legislative history" for an amendment enacted by initiative. *The Recorder v. Commission on Judicial Performance*, 72 Cal. App. 4th 258, 271 (1999).

Here, the Charter specifically limits the City's power to award its public works municipal affair contracts by requiring that those contracts over a City Council-specified amount be competitively bid and awarded to the lowest responsible and reliable bidder. San Diego Charter § 94. The Charter contains no provision expressly authorizing the inclusion of a prevailing wage specification in the City's municipal affair public works projects. Under the rules of charter construction, however, the mere failure of the Charter to expressly grant the power to include such a specification does not render the specification void.

Similarly, the Charter does not expressly forbid the City from including a prevailing wage specification in its public works municipal affair projects. The legislative history of the Charter, however, reveals that former Charter section 193 mandated the payment of prevailing wage on the City's public work contracts. That section, along with other related sections, were repealed by the voters in 1963. As such, it is not clear whether the repeal of Charter section 193 implied a voter mandate that the City be precluded from requiring prevailing wage on its public works municipal affair projects. In order to resolve this ambiguity, the ballot arguments for the proposition amending the Charter to repeal Section 193 must be examined.

Proposition U, repealing Article XII, Sections 193 through 195, 195.1, and 196 through 201 of the Charter, was passed by the voters in September of 1963 [See Attachment 2]. The Argument for Proposition U explained:

This proposition eliminates present detailed and sometimes misleading charter provisions regarding regulation of labor on public works of the City. In place of the present charter provisions it is proposed that state law govern labor on public works. The state laws provisions, in the opinion of the Charter Review Committee, are clearer and provide for approximately the same benefits, safeguards, and requirements. The proposal is also in conformity to the committee's desire to make the charter truly a constitutional document.

[See Attachment 2]. There was no argument against Proposition U. [See Attachment 2].

The ballot argument in favor of Proposition U suggests that the intent of the voters in repealing Charter Section 193 was merely to eliminate the Charter's regulation of labor on public works and to allow state law to govern the use of that labor.³ It does not suggest that the voters intended that the City be precluded from requiring prevailing wage on its public works municipal affair projects. As such, we conclude that the repeal of Charter section 193 in and of itself does not prohibit the City from including a prevailing wage specification on those projects.

3. A Prevailing Wage Specification May be Consistent with the Purposes of Competitive Bidding.

Although we conclude that the Charter does not expressly forbid or authorize a prevailing wage specification, we must determine whether that specification conflicts with the Charter's competitive bidding requirements. *See Domar Electric*, 9 Cal. 4th at 172-73. The purposes of competitive bidding are: to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; to obtain the best economic result for the public; and to stimulate advantageous market place competition. *Associated Builders and Contractors, Inc. v. San Francisco Airports Commission*, 21 Cal. 4th 352, 365 (1999).

Further, competitive bidding laws are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest. *Associated Builders*, 21 Cal. 4th at 372-73. To assist us in analyzing whether a prevailing wage specification is consistent with competitive bidding requirements, we reviewed the California Supreme Court's decision in *Associated Builders*.

³ As stated earlier, current state case law holds that the City need not require the payment of prevailing wage on its public works municipal affair projects.

At issue in *Associated Builders* was whether a project stabilization agreement [PSA] that was included as a bid specification in a ten-year 2.4 billion dollar project expanding and renovating the San Francisco International Airport violated state or local competitive bidding laws. 21 Cal. 4th at 358, 363-65. The PSA was designed to eliminate potential delays resulting from labor strife, to ensure a steady supply of skilled labor, and to provide a contractually binding means of resolving worker grievances. *Id.* at 359. Specifically, the PSA required the signatory unions to agree for the life of the project to a no-strike pledge, to arbitrate jurisdictional disputes among crafts, and to continue working on the project despite the expiration of any applicable collective bargaining agreements. *Id.* at 358. In exchange, the Airports Commission agreed to require all contractors to accept the terms of the PSA, to abide by each craft's labor-management grievance procedure in cases of discipline or discharge, to use the union hiring hall for any new hires needed beyond the employer's own core workforce, and to pay union wages and benefits.⁴ *Id.* at 358-59.

The California Supreme Court held that the PSA specification was consistent with the purposes of competitive bidding.⁵ *Associated Builders*, 21 Cal. 4th at 365. The Court also held that the record contained substantial evidence that the PSA furthered legitimate governmental interests that were consistent with the competitive bidding laws, and thus supported the decision to require agreement to the PSA as a condition of a contractor's participation in the project. *Id.*

Specifically, the Court found that all prospective bidders enjoyed equal opportunity to compete for contracts on the project. *Associated Builders*, 21 Cal. 4th at 367. The Court reasoned that the fact that some contractors may have been disinclined to accept the terms of the PSA did not imply any favoritism toward the bidders that did not share that disinclination. *Id.* The Court further reasoned that on its face the PSA did not exclude any contractor from bidding on the project. *Id.* Additionally, the Court found no evidence that union contractors had an advantage in attracting workers or in the bidding process generally. *Id.* at 368. The Court added that there was no authority presented supporting the existence of an "unfettered competition" policy underlying the competitive bidding law of California. *See id.* at 372.

The Court also found that there was no evidence in the record to conclude that the PSA would raise the costs of the project. *Associated Builders*, 21 Cal. 4th at 369. The Court rejected the argument that costs would be lower without the PSA because nonunion contractors could otherwise use unskilled workers. *See id.* The Court reasoned that the substitution of unskilled workers to lower costs was potentially contrary to both state and federal law applicable to prevailing wage public works jobs. *Id.* The Court further reasoned that a bidder could not lower

⁴ The employers on the airport project were required by the San Francisco charter to pay prevailing wage regardless of the PSA. *See Associated Builders*, 21 Cal. 4th at 359 n. 1.

⁵ The Court made it clear, however, that the imposition of a PSA requirement must be reviewed on a case-by-case basis for consistency with competitive bidding requirements. *Associated Builders*, 21 Cal. 4th at 376.

its costs by substituting unskilled “helpers” for any skilled workers demanded by the contract specifications. *Id.*

Finally, the Court concluded that substantial evidence supported the inclusion of the PSA bid specification as being in furtherance of the legitimate governmental interests of preventing costly delays and assuring contractors access to skilled craft workers. *Associated Builders*, 21 Cal. 4th at 374. The record reflected that the San Francisco Airports Commission [Commission] was concerned about the potential for labor strife during the life of the project. *Id.* There was evidence that for every month of delay, the cost of administering the project would substantially increase and revenue would be lost. *Id.* at 374-75.

On the other hand, there was no evidence in the record that the cost of the work would increase as a result of the PSA. *Associated Builders* 21 Cal. 4th at 375. The PSA provisions were designed to prevent the costs associated with delay caused by labor strife. *Id.* In view of the evidence before the Commission demonstrating the substantial costs associated with delays that could be prevented by the PSA, the Court found that the adoption of the PSA specification was not arbitrary, capricious, or lacking in evidentiary support. *Id.* According to the Court, the Commission could properly find that the PSA served the goals of the competitive bidding laws, in particular to secure the best work or supplies at the lowest price practicable for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders. *Id.*

Based on the California Supreme Court's rationale in *Associated Builders*, we conclude that the California courts could hold on a case-by-case/project-by-project basis that a prevailing wage specification is consistent with the purposes of competitive bidding. First, as with the PSA in *Associated Builders*, the courts should find that a prevailing wage specification is competitive because all prospective bidders would enjoy equal opportunity to compete for the contract. The specification would not bar or substantially discriminate against a class of contractors because it would not on its face exclude any contractor from bidding.⁶ Second, the courts should follow the Supreme Court's reasoning in *Associated Builders* and conclude that the fact that some contractors may be disinclined to pay prevailing wage does not imply favoritism on the part of the City toward contractors who are not so disinclined.

Finally, the courts could conclude, depending on the facts of a particular project, that a prevailing wage specification is consistent with the competitive bidding purposes of preventing the waste of public funds and obtaining the best economic result for the public. For example, if there is evidence in the record that the specification would be a cost-effective measure for the project the courts should find that the specification is consistent with those purposes. Similarly, if there is evidence in the record that the specification would not increase the cost of the project, the courts should find a prevailing wage specification to be consistent. If, however, there is

⁶ In fact, in *Associated Builders*, the Court noted that the prevailing wage laws are designed in part to permit union and nonunion contractors to compete on an even footing for public contracts. 21 Cal. 4th at 368.

evidence in the record that a prevailing wage specification would increase the cost of the project, and there is no evidence that the specification would provide any corresponding economic benefit to the taxpayers, the courts should find that the specification is inconsistent with the purposes of competitive bidding.⁷

4. A Prevailing Wage Specification Could Reasonably Relate to the Quality, Fitness, and Capacity of a Bidder to Satisfactorily Perform the Proposed Work.

The Charter's competitive bidding requirements include a requirement to award to the lowest responsible and reliable bidder. San Diego Charter § 94. A competitive bidding scheme with a lowest responsible and reliable bidder restriction ordinarily requires a contract to be awarded to the bidder who submits the lowest monetary bid and is responsible. *Domar Electric*, 9 Cal. 4th at 178. The term "lowest responsible bidder" means the lowest bidder whose offer best responds in qualify, fitness, and capacity to the particular requirements of the proposed work. *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court*, 7 Cal. 3d 861, 867-68 n. 5 (1972), citing *West v. City of Oakland*, 30 Cal. App. 556, 560 (1916). This definition emphasizes the element of "responsiveness;" thus a responsible bid is one that responds to all proper bid specifications. *Associated Builders*, 21 Cal. 4th at 366.

Proper bid specifications generally include those that reasonably relate to the quality, fitness, and capacity of a bidder to satisfactorily perform the proposed work. *See Associated Builders*, 21 Cal. 4th at 366. In setting bid specifications, the public agency must be accorded considerable latitude. *Id.* By necessary implication, the direct cost of the project need not be the agency's sole consideration in setting bid specifications. *Id.*

As discussed above, in *Associated Builders* the California Supreme Court determined that a project stabilization agreement [PSA] was an appropriate specification. Impliedly the Court found that the PSA reasonably related to the quality, fitness, and capacity of the bidder to satisfactorily perform the proposed work. The Court reasoned that the public agency could properly find that the PSA served to secure the best work at the lowest price practicable for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders. *Associated Builders* 21 Cal. 4th at 375.

Similarly, a court could find, depending on the facts of a particular project, that a prevailing wage specification is reasonably related to the quality, fitness, and capacity of the bidder to perform the work. For example, the specification should be upheld if the City could show that the specification served to secure the best work at the lowest price practicable for the benefit of property holders and taxpayers.

⁷ Whether the prevailing wage specification substantially increased the cost of the project was not an issue in *Associated Builders* because the specification was mandated by the San Francisco charter, not the PSA.

5. Prior Office Opinions on Prevailing Wage are Reversed to the Extent They are Inconsistent with this Opinion.

Historically, this Office has opined that the City cannot require the payment of prevailing wage on City public works municipal affair contracts that are subject to the Charter's lowest responsible and reliable bidder requirement. *See* 1993 City Att'y MOL 318. For example, we reasoned that because a prevailing wage specification is not related to the bidder's qualifications, skill, or quality of work, or to the amount of the bid, the City is precluded from requiring that specification. *See* 1990 City Att'y MOL 164, 166-67.

Our opinion was further based on the rationale that a prevailing wage requirement would exclude bidders who are otherwise responsible and reliable but who will not or cannot pay prevailing wage. 1990 City Att'y MOL 164, 166-67. Because there was no California case on point at that time, the rationale of other state courts in similar circumstances was applied, compelling the conclusion that the City would be imposing a limitation other than responsibility upon the bidders, excluding the free competition prescribed by the Charter. *See id.*

Since 1990, however, the California courts have clarified their approach to analyzing whether a particular specification serves the purposes of competitive bidding laws. As set forth at length above, the California Supreme Court has clarified the analysis for determining whether a particular specification is consistent with the competitive bidding and lowest responsible bidder mandates of a city's charter. As such, our prior opinions are reversed to the extent that they conflict with this opinion.

B. Resolution No. R-251555 Should be Rescinded Before a Prevailing Wage Specification is Included in a City Public Works Municipal Affair Project.

Although we have concluded that the Charter does not necessarily prohibit the inclusion of a prevailing wage specification in the City's public works municipal affair projects, the City Council by Resolution No. R-251555 has as a policy matter directed that such a specification not be included. Specifically, the Resolution provides:

WHEREAS, it is considered appropriate thereafter to use the Davis-Bacon or State Department of Industrial Relations Wage Determinations only when required by Federal or State grants and on other jobs considered to be of State concern;

[See Attachment 4].

Generally, a resolution is a declaration with respect to the future purposes of the legislative body and often relates to the administration of the municipality. *See City of Sausalito v. County of Marin*, 12 Cal. App. 3d 550, 565-67 (1970). Here, by resolution the Council has

declared its intent that prevailing wage specifications should not be included in the City's public works municipal affair projects. As such, a prevailing wage specification should not be included unless the City Council rescinds Resolution No. R-251555.

II. State or Federal Funds Requiring the Payment of Prevailing Wage May be Used on Public Works Municipal Affair Projects When the Use of those Funds are Required to Construct the Project, but if the Funds are not Required to Construct the Project, a Case-by-Case Analysis Must be Performed.

The City has access to certain state and federal funds to assist in construction of its municipal affair projects. Often, the use of these funds requires the City to include a prevailing wage specification in its construction contracts. As discussed at length above, a prevailing wage specification included in a public works municipal affair contract may or may not conflict with the Charter. As such, it must be determined on a project-by-project basis whether a prevailing wage specification is consistent with the Charter.

We found no California law addressing the issue of whether a charter city may use non-city funds on a municipal affair project when the use of those funds would impose requirements that conflict with the city's charter. It is unreasonable to conclude, however, that the courts would universally disqualify City public works municipal affair projects from federal or state funding that would impose provisions conflicting with the Charter. Such a decision could potentially result in the inability of a charter city to construct necessary and/or desirable public works. On the other hand, it is also unreasonable to conclude that the courts would legitimize the use of such funds when the funds are not necessary to construct the project and are used solely to circumvent the requirements of a city's charter.

Therefore, we conclude that the City may use federal or state funds imposing a prevailing wage requirement on a public works municipal affair project when the use of those funds are necessary to construct the project. If, however, the funds are not necessary to construct the project, the City may use those funds only if on a project-by-project basis it is determined that a prevailing wage specification would be consistent with the Charter.

III. If the City Desires to Include a Prevailing Wage Specification Without Conducting a Project-by-Project Analysis, the Charter Must be Amended.

If the City desires to include a prevailing wage specification in its public works municipal affair projects without conducting a project-by-project analysis, the Charter must first be amended. A charter city may not act in conflict with its charter. *Domar Electric*, 9 Cal. 4th at 171. Any anti-competitive exceptions to a city charter's competitive bidding requirements must also be enumerated in the charter. *See id.* at 172-76.

As discussed above, a prevailing wage specification could potentially conflict with the competitive bidding requirements of the Charter. As such, each project must be assessed on an individual basis to determine whether that specification would be consistent with the Charter. For example, if a prevailing wage specification would increase the cost of a project without providing any corresponding economic benefit to the City and the taxpayers, the specification would be in conflict with the Charter and would be legally prohibited. If, however, the Charter is amended to allow for the payment of prevailing wage, there would be no potential conflict and therefore a project-by-project analysis would not be necessary.

CONCLUSION

The City of San Diego is a charter city, and as such the City may not act in conflict with the Charter. The Charter requires the City to competitively bid and award certain public works municipal affair projects to the lowest responsible and reliable bidder. A prevailing wage specification should not conflict with the Charter requirements if on a project-by-project basis there is evidence in the record that the specification serves to prevent the waste of public funds or to obtain the best economic result for the public. Additionally, the record should show that the specification is reasonably related to the quality, fitness, and capacity of a bidder to satisfactorily perform the proposed work. The City should not, however, include a prevailing wage specification in its public works municipal affair contracts unless the City Council rescinds Resolution No. R-251555.

The City may use federal or state funds imposing a prevailing wage requirement on its public works municipal affair projects when the use of those funds are necessary to construct the project. If the funds are not necessary to construct the project, the City may use the funds only if it is determined on a project-by-project basis that the prevailing wage requirement would not conflict with the Charter. If the City desires to include a prevailing wage specification without conducting a project-by-project analysis as outlined above, the Charter must be amended.

Respectfully
submitted,

CASEY GWINN

City Attorney

CG:LWG:lwg:sr
Attachments
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